

[ENGLISH TRANSLATION]

Docket: 2015-2577(IT)I

BETWEEN:

PIERRE FIL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 23, 2016, at Montréal, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Mounes Ayadi

JUDGMENT

The appeal of the reassessments issued under the *Income Tax Act* is dismissed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 15th day of September 2016.

"B. Paris"

Paris J.

[ENGLISH TRANSLATION]

Citation: 2016 TCC 200

Date: 20160915

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PIERRE FIL,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] This appeal was heard under the informal procedure. This is an appeal of income tax assessments for the 2010 and 2011 taxation years, in which the Minister of National Revenue (the Minister) disallowed the deduction of the following business losses:

2010	\$22,000
2011	\$23,167

[2] In issuing the assessments, the Minister deduced that the jewelry buying and reselling activity in which the appellant was involved did not constitute a source of income under section 3 of the *Income Tax Act* (the ITA), and that, even if it were a source of income, the expenses deducted with respect to this activity were not incurred, or were not incurred in hopes of turning a profit from the activity.

[3] A source of income is an activity carried out for profit, and when such an activity contains a personal element, it must be carried out in a commercial manner (*Stewart v. Canada*, 2002 SCC 46).

[4] In this case, it is clear that the activity carried out by the appellant contained a personal element. The appellant used his personal vehicle and a portion of his residence for the purposes of the activity, and claimed a significant portion of the associated expenses as deductions in calculating his income. For the most part, these were costs that the appellant would have incurred even without being involved in the activity in question.

[5] Therefore, the first question to be answered is whether the appellant operated the business in a sufficiently commercial manner for it to constitute a source of income. In paragraphs 54 and 55 of *Stewart*, the Supreme Court stated:

54 It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, in expanded form, the first stage of the above test can be restated as follows: “Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?” This requires the taxpayer to establish that his or her predominant intention is to make a profit from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.

55 The objective factors listed by Dickson J. in *Moldowan*, at p. 486, were: (1) the profit and loss experience in past years; (2) the taxpayer’s training; (3) the taxpayer’s intended course of action; and (4) the capability of the venture to show a profit. As we conclude below, it is not necessary for the purposes of this appeal to expand on this list of factors. As such, we decline to do so; however, we would reiterate Dickson J.’s caution that this list is not intended to be exhaustive, and that the factors will differ with the nature and extent of the undertaking. We would also emphasize that although the reasonable expectation of profit is a factor to be considered at this stage, it is not the only factor, nor is it conclusive. The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. However, this assessment should not be used to second-guess the business judgment of the taxpayer. It is the commercial nature of the taxpayer’s activity which must be evaluated, not his or her business acumen.

[6] The appellant claims that it is difficult for him to substantiate the commercial nature of his business at this time, as all of the relevant documents regarding the business’ operation were stolen from his residence in February 2012 during a robbery. In addition to the documents, the appellant claimed that jewelry, a stereo system, sporting goods, and various other goods were stolen, for a total value of \$62,570. He states that when the tax audit began at the start of 2013, he

informed the Canada Revenue Agency (the CRA) auditor that he had no documents, and that the auditor did not ask him to provide copies of documents or other written evidence from his suppliers or clients. He claimed that he was therefore surprised to learn, 20 months later, once the CRA had processed his objection, that his claim that his business was a source of income had not been accepted, and that at that time, he said, it was too late to recover the documentary evidence. His main supplier, Bidz.com, had declared bankruptcy in 2011, and certain other suppliers could no longer be found. He was also unable to obtain a copy of the ads that he had posted because too much time had passed, and as for the newspaper *autoHEBDO*, it was now only available on the Internet.

[7] According to the appellant's testimony, he started his business in 2006 and sold jewelry and watches—mainly Lamborghini brand watches. He bought his stock in the United States, from two websites, of which Bidz.com was the biggest. He says that he bought jewelry and watches in large quantities and had hundreds of watches to sell. Nevertheless, it was hard to turn a profit from sales due to competition from vendors on eBay, who offered the same products, or products similar to those he offered, at lower prices than his. He was therefore forced to lower his prices, and this led to the losses. He claimed the following gross revenue and net business losses:

	Gross business revenue	Net business revenue (losses)
2006	\$28,110	(\$27,030)
2007	\$12,000	(\$28,940)
2008	\$10,000	(\$24,287)
2009	\$27,200	(\$19,695)
2010	\$23,000	(\$22,000)
2011	\$26,000	(\$23,167)
Total	\$126,310	(\$145,119)

[8] The appellant testified that he had tried, without specifying how, to increase his buying power in order to make his business profitable. He also said that, toward the end of 2011, just before he stopped operating the business, following the robbery, he had partnered with another vendor and planned either to open a kiosk or "to launch on eBay." However, his partner died shortly thereafter and the appellant decided to close the business. The appellant reiterated that he could not offer prices as low as those of American vendors on eBay and that that was the

cause of his losses. He said that he offset his losses by drawing on employment income earned at Bombardier, where he has worked full-time for 19 years.

[9] The burden of proving the commercial nature of his activity rests with the appellant and, in my view, the evidence submitted is insufficient to relieve the appellant of this burden.

[10] Firstly, in my view, the appellant's testimony regarding the lack of documents was not credible, and I have difficulty believing his testimony that all of his documents were stolen when his house was robbed.

[11] As the appellant himself stated, the documents had no value and would have held little interest for a robber. I also note that there is no mention of document theft in the police report on the event. The appellant said that he had not mentioned the theft of the documents to the police or to his insurer because they had no dollar value, but he nonetheless mentioned the theft of an identification document and of his passport. Another remarkable thing is that the appellant declared the theft of just one watch, one ring and one bracelet, for a total value of \$9,200, which seems like very little stock for a business that sells jewelry, and which, according to the appellant, bought jewelry and watches in large quantities.

[12] I am also unconvinced that it would have been impossible for the appellant to recover his documents, at least in part. Although his main supplier had filed for bankruptcy, the appellant said that he paid for all of his purchases by credit card or PayPal. It seems to me that copies of account statements should exist, along with proof of payment of the credit card interest he claimed. It also appears that the appellant often used the Internet to buy and sell, and it would surprise me if there were not a number of relevant emails that could have been provided to the Court.

[13] Furthermore, although the appellant testified that his main supplier was Bidz.com and that he made his purchases on the Internet, in a questionnaire regarding vehicle expenses, which he filled out at the CRA's request, he had indicated that he made "a lot of purchases in Toronto."

[14] The other factors mentioned in *Stewart* for assessing the commercial nature of a business include the taxpayer's training, the taxpayer's intended course of action, and the capability of the venture to show a profit. Although the appellant had shown a longstanding interest in jewelry, he had no training in this field nor any business training. His business plan was to make his business profitable by reducing his purchasing costs and increasing his buying power, but, aside from

expressing these general intentions, he did not specify how he expected to achieve this goal. Lastly, the uninterrupted series of losses and the closure of the business in 2012 show objectively that the business did not have the ability to turn a profit in the way it was being run by the appellant.

[15] For all of these reasons, I find that the appellant's activity did not constitute a source of income in 2010 and 2011. Given this finding, it is not necessary to determine the deductibility of the specific expenses claimed by the appellant, and the appeal is dismissed.

Signed at Ottawa, Canada, this 15th day of September 2016.

"B. Paris"

Paris J.

CITATION: 2016 TCC 200

COURT FILE NO.: 2015-2577(IT)I

STYLE OF CAUSE: PIERRE FIL v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: August 23, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATED: September 15, 2016

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Mounes Ayadi

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